SUPREME COURT, U. S.
LIBRARY

Supreme Court, U. S.
FILED
AUG 15 1974
MICHAEL RODAK, JR., CLERK

No. 73-2041

In the
Supreme Court of the United States
OCTOBER TERM, 1973.

NEWTON E. SEWELL and J. B. HOWELL,
Petitioners,

vs.

PENN CENTRAL TRANSPORTATION COMPANY and INDIANA HARBOR BELT RAILROAD COMPANY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CALVIN K. HUBBELL
Attorney for Respondents

532 Union Station
Chicago, Illinois 60606

The Scheffer Press, Inc.—(312) 263-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973.

No. 73-2041

NEWTON E. SEWELL and J. B. HOWELL,

Petitioners,

vs.

PENN CENTRAL TRANSPORTATION COMPANY and INDIANA HARBOR BELT RAILROAD COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINION BELOW

The opinion below has not been officially reported.

QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming dismissal of a complaint by two railroad employees of Indiana Harbor Belt Railroad Company, on the basis that the National Railroad Adjustment Board had exclusive jurisdiction of the claims of such employees for lost wages for periods when they had been dismissed but subsequently reinstated (in each case), and of the

claim of plaintiff Sewell that he had been dismissed a second time but was progressing a claim for reinstatement and back pay under the appropriate grievance procedure.

STATEMENT OF THE CASE

The statement of the case on page 3 of the Petition, second paragraph, is accepted.

ARGUMENT

Petitioners have failed to state any basis whatsoever on which this Court should exercise its discretion under Rule 19 to grant certiorari. No special or important reasons for such an action are advanced. Nor can there be.

There is no showing of any conflict in decisions of the respective courts of appeals. The Court of Appeals for the Seventh Circuit followed the precedent established by the Fourth Circuit in *Dorsey* v. *C&O Railroad,* 476 F.2d 243 (1973) in ruling that claims under railroad employment contracts do not present any basis for federal court jurisdiction. The federal courts are not the "guarantor of any rights of either labor or management . . . either by force of the Constitution or the Railway Labor Act," in connection with railroad grievance matters. 476 F.2d 245.

Nor is there presented an important question of federal law which has not been, but should be settled by this Court. Nor is there presented any conflict with prior decisions of this Court.

To the contrary, this Court in *Andrews* v. *Louisville and Nashville Railroad,* relied on below, and with respect to petitioners' constitutional contentions, commented as follows at 406 U.S. 324:

> "The very concept of wrongful discharge implies some sort of statutory or contractual standard that modifies the traditional common law rule that a contract of employment is terminable by either party at will. Here it is conceded by all that the *only* source of petitioner's right not to be discharged, and therefore to treat an alleged discharge as a

'wrongful' one that entitled him to damages, is the collective-bargaining agreement between the employer and the union." (emphasis added)

This holding unequivocally disposes of any contention that there is a constitutional right to railroad employment or any constitutional regulation of the treatment of employees by their employer.

The Petitioners assert that the complaint charges the railroad with a "separate and distinct course of conduct for which the common law had traditionally provided a remedy." (Petition, page 6.) No cases are cited for this proposition. Nor can there be. On the contrary, the established common law doctrine, as stated by this Court in the quotation above, is that in the absence of a contract, *employment is at will*. The alleged "constitutional" and "common law" rights to be employed free of "harassment" simply do not exist in law. Certainly nothing was offered to support petitioners in the proceedings below.

Petitioners further refer to "statutory" rights which allegedly protect employees from "multiple discharges and personal harassment." (Petition, page 7.) Again, however, no statutory authority is cited for the assertion of any such rights. Petitioners also refer to "governmental interference in their rights to hold specific private employment." (Petition, page 7.) However, no governmental action or inaction was alleged or shown in the pleadings in this case. If petitioners are attempting to object to some action or inaction by the government, they should have named governmental agencies or officers as defendants, and not file suit against their private employer. It is axiomatic that actions by the railroad do not and cannot constitute governmental action.

In the most general terms petitioners attempt to assert a constitutional right to protection against alleged abuse. However, they totally fail to refer to any case law or authority whatsoever supporting such rights. To reiterate, all the authorities are in accord that no constitutional rights are violated by the application of the well-established doctrine that employees' claims under collective agreements in the railroad industry are subject to the primary and exclusive jurisdiction of the National Railroad Adjustment Board. *Andrews* v. *Louisville and Nashville Railroad,* 406 U.S. 320 (1972); *Slocum* v. *DL&W R.R.,* 339 U.S. 239 (1950); *Pennsylvania Railroad* v. *Day,* 360 U.S. 548 (1959); *Union Pacific Railroad* v. *Price,* 360 U.S. 601 (1959) (See, on the constitutional point, dissents in the last two cited cases); *Virginia Railway* v. *System Federation Number 40,* 300 U.S. 515, 553 (1937); *Brotherhood of Railroad Trainmen* v. *Chicago and Indiana Railroad,* 355 U.S. 30 (1957).

CONCLUSION

Respondents, therefore, respectfully submit that no substantial basis is advanced in the Petition to lead, let alone persuade, this Court to review the decision of the Court of Appeals of the Seventh Circuit in this cause. The Petition should, therefore, be denied.

Respectfully submitted,

CALVIN K. HUBBELL
Attorney for Respondents

532 Union Station
Chicago, Illinois 60606